

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LINDA DOWNS,)
Plaintiff,) 3:11-cv-0885-LRH-WGC
v.)
RIVER CITY GROUP, LLC; et al.,)
Defendants.)

)

Before the court is plaintiff Linda Downs' ("Downs") motion for reconsideration of the court's order granting defendant Minnesota Life Insurance Company's ("Minnesota Life") motion for summary judgment (Doc. #207¹). Doc. #209. Minnesota Life filed an opposition (Doc. #210) to which Downs replied (Doc. #211).

I. Facts and Procedural History

In July, 2005, Downs, along with her husband Ronald, purchased real property through a mortgage note and deed of trust originated by defendant River City Group, LLC ("River City"). In early December, 2009, Downs and her husband purchased mortgage payment protection insurance advertised by defendant Wells Fargo Bank, NA ("Wells Fargo") and underwritten by defendant Minnesota Life. The insurance policy provided for twelve (12) monthly payments of \$2,398.23 - the amount of the Downs' mortgage - to Wells Fargo in the event of Ronald's death.

¹ Refers to the court's docket entry number.

1 On May 31, 2010, Ronald passed away. On June 10, 2010, Downs contacted both Wells
2 Fargo and Minnesota Life and notified them of Ronald's passing and requested the payment of the
3 mortgage payments pursuant to the mortgage insurance policy. On June 17, 2010, Minnesota Life
4 acknowledged receipt of Downs's claim and requested additional information including:
5 (1) a certified death certificate; (2) a completed Health History Information Request form; and
6 (3) a completed Health Insurance Portability and Accountability Act ("HIPAA") authorization
7 form. Downs sent the request information on July 6, 2010, and Minnesota Life received the
8 information on July 9, 2010.

9 After receiving the information, Minnesota Life communicated to Downs that because
10 Ronald had died within the first two years of the policy's effective date, the coverage was
11 contestable, and Minnesota Life would be conducting a routine coverage review. As part of its
12 coverage investigation, Minnesota Life requested additional medical records from Dr. John
13 Williamson ("Dr. Williamson") and the Northern Nevada Medical Center ("NNMC").
14 Minnesota Life received the records from Dr. Williamson on July 29, 2010, and received the
15 records from NNMC on August 11, 2010.

16 On August 18, 2010, Minnesota Life completed its contestability review, approved Downs'
17 claim for payment, and sent Wells Fargo a check for \$9,572.92 to cover the mortgage payments
18 from May 2010, through August 2010. Thereafter, Minnesota Life made payments in accord with
19 the payment schedule as prescribed under the policy. However, prior to the disbursement of funds
20 from Minnesota Life, defendant Wells Fargo initiated non-judicial foreclosure proceedings against
21 the underlying property for failure to pay the mortgage payments since May 2010.

22 Subsequently, Downs filed a complaint alleging ten causes of action against all defendants:
23 (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress;
24 (3) breach of contract; (4) breach of the implied covenants of good faith and fair dealing; (5) unfair
25 claims practices; (6) conspiracy to defraud; (7) negligence; (8) invasion of privacy; (9) unjust
26 enrichment; and (10) quite title. Doc. #1, Exhibit A.

1 In response, Minnesota Life filed a motion for summary judgment (Doc. #155²) which was
 2 granted by the court (Doc. #207). Thereafter, Downs filed the present motion for reconsideration.
 3 Doc. #209.

4 **II. Discussion**

5 Downs brings her motion to reconsider pursuant to Federal Rule of Civil Procedure 60(b).
 6 A motion under Rule 60(b) is an “extraordinary remedy, to be used sparingly in the interests of
 7 finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d
 8 887, 890 (9th Cir. 2000). A district court may reconsider a prior order where the court is presented
 9 with newly discovered evidence, an intervening change of controlling law, manifest injustice, or
 10 where the prior order was clearly erroneous. Fed. R. Civ. P. 60(b)(1)–(6); *United States v. Cuddy*,
 11 147 F.3d 1111, 1114 (9th Cir. 1998); *School Dist. No. 1J, Multnomah County v. Acands, Inc.*,
 12 5 F.3d 1255, 1263 (9th Cir. 1993).

13 In her motion for reconsideration, Downs raises two challenges to the court’s order. First,
 14 Downs argues that the court erred in holding that Minnesota Life did not breach the mortgage
 15 insurance policy as a matter of law. Second, Downs argues that the court erred in holding that she
 16 had not proffered evidence of a physical injury sufficient to support her claim for negligent
 17 infliction of emotional distress. *See* Doc. #207. The court shall address each argument below.

18 **A. Breach of Contract**

19 In her motion, Downs contends that the court erred in finding that defendant Minnesota Life
 20 did not breach the mortgage insurance policy as a matter of law by failing to pay the mortgage
 21 payments within thirty (30) days of receipt of Ronald’s death certificate. *See* Doc. #209. The court
 22 disagrees.

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25 ² In its motion for summary judgment, Minnesota Life did not move for summary judgment on Downs’s
 26 sixth cause of action for conspiracy to defraud, eighth cause of action for invasion of privacy, or tenth cause
 of action for quiet title.

1 In addressing Minnesota Life's motion for summary judgment (Doc. #155), the court found
2 that Minnesota Life did not breach the mortgage payment protection policy as a matter of law
3 because Minnesota Life timely paid the mortgage payments to defendant Wells Fargo after
4 satisfactory proof of Ronald's death. *See* Doc. #207. In particular, the court found that "the relevant
5 contractual provision of the underlying policy provides that 'the monthly benefit will be payable
6 within 30 days after we receive proof satisfactory to us that you died . . . while insured under this
7 certificate.'" *Id.* (internal citations omitted)."

8 In contrast to Downs' argument, this provision requires satisfactory proof that both (1) the
9 decedent died, and (2) the decedent was indeed insured under the policy at the time of his death.
10 As to the second element, the policy contained a contestability clause during the first two years of
11 the policy's life that allowed Minnesota Life to conduct a timely review prior to approving Downs'
12 claim, including requesting additional medical information about Ronald to determine whether he
13 had a terminal illness or other uninsurable medical conditions at the time he signed the policy. *Id.*

14 The court recognizes that Minnesota Life received satisfactory proof that Ronald had died
15 on July 9, 2010. However, Minnesota Life did not receive satisfactory proof that Ronald was
16 insured under the policy at the time of his death until receipt of the requested medical records on
17 August 11, 2010. Minnesota Life completed its contestability review and paid out all owed benefits
18 on August 18, 2010, only seven days after receiving the requested information, and well within the
19 thirty day time period contemplated in the policy. Thus, because Minnesota Life had a legal right to
20 conduct its contestability review and all owed benefits were paid within thirty days of receipt of all
21 requested information, it did not breach of the insurance policy. Accordingly, the court shall deny
22 Downs' motion for reconsideration as to this issue.

23 **B. Evidence of Physical Injury**

24 In the court's order on summary judgment, the court found that "Downs [did] not establish
25 any underlying separate physical injury to support her claim of negligent infliction of emotional
26 distress." Doc. #207. Downs argues that the court's finding was in error because there was evidence

1 of an excess of cortisol, allegedly resulting from her emotional distress, which caused her body to
2 retain fluids causing severe swelling. *See Doc. #209.*

3 The court has reviewed the documents and pleadings on file in this matter and finds that it
4 erred in finding that Downs did not provide evidence of a physical injury to support her claims for
5 intentional and negligent infliction of emotional distress. However, the court also finds that
6 reconsideration of the court's order is not warranted because Downs' claims still fail as a matter of
7 law. First, as the court has previously found - and which was not challenged in Downs' present
8 motion - Minnesota Life's conduct, in conducting a contestability review, does not rise to the level
9 of extreme or outrageous conduct. Second, it is undisputed that Minnesota Life took no action in
10 carrying out the non-judicial foreclosure of her property. Finally, there is no evidence of any
11 underlying negligent conduct by Minnesota Life. Thus, Minnesota Life is still entitled to summary
12 judgment on Downs' claims for intentional and negligent infliction of emotional distress.

13 Accordingly, the court shall deny Downs' motion for reconsideration.

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15 IT IS THEREFORE ORDERED that plaintiff's motion for reconsideration (Doc. #209) is
16 DENIED.

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IT IS SO ORDERED.

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DATED this 4th day of December, 2013.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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